



## **FACULTY OF JURIDICAL SCIENCES**

**Course : BALLB , 3<sup>rd</sup> Semester**

**Subject : CONSTITUTIONAL LAW I**

**Subject code : BAL304**

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## **Constitutional law - I**

**OBJECTIVE:** The objective of this paper is to provide understanding of basic concepts of Indian Constitution and various organs created by the constitution including their functions.

### **UNIT – I**

- **Salient features of the Indian Constitution.**
- **Preamble**
- **Definition of State (Art. 12)**
- **Doctrines of Ultra-vires, severability, eclipse, waiver (Art, 13)**

### **UNIT-II**

- **Right to equality (Art. 14)**
- **Prohibition of discrimination, Rights to equality of opportunity (Art. 15-16)**
- **Right to freedom under Article 19: Freedom of association; Freedom of movement;**
- **Freedom of residence; Freedom of assembly; Freedom of association; Freedom of**
- **movement; Freedom of residence; Freedom of occupation, trade and business;**
- **Right to take out processions; Right of the State to impose reasonable restrictions**

### **UNIT – III**

- **Protection in respect of Conviction under Article 20,**
- **Ex-post-facto law; Double jeopardy; Self-incrimination;**
- **Right of Life and Personal Liberty (Art. 21),**
- **Protection in respect of arrest and detention**
- **Right to freedom of religion (Articles 25-28)**

### **UNIT – IV**

- **Cultural and Education Rights (Articles 29-30)**
- **Enforcement of Fundamental Right, Writ Jurisdiction of the Supreme Court and**
- **High Court (Article 32, 226)**
- **Right to property before and after the Constitution 42nd Amendment Act, 1976**
- **Abolition of Untouchability, Titles (Articles 17-18)**
- **Right against exploitation (Articles 23, 24)**

### **Suggested Readings:**

1. **Austin Granville: Constitution of India: Cornerstone of a Nation; and Working A Democratic constitution**
2. **NarenderKumar : Constitutional Law of India.**
3. **Basu D. D : Shorter Constitution of India**
4. **Jain, M.P.: Constitutional Law of India,**
5. **Seervai, H.M. : Constitutional Law of India, Vols. I-III**
6. **Shukla, V.N. : Constitutional of India (ed. M.P.Singh)**
7. **B.R. Sharma : Constitutional Law and judicial Activism**
8. **M.C. Jain Kagzi : The constitution of India**
9. **B. Shiva Rao: The Framing of India's Constitution**

# LECTURE 24

function and was a political document and the refusal to grant passport could not be subjected to judicial review.

2.86 In this case, the petitioner had raised the following questions: 1. The right to travel abroad and to return to India was part of personal liberty guaranteed by Article 21. 2. Refusal of a passport amounted to deprivation of personal liberty since without such a passport one could not leave the country and if he did he could not come back. 3. The deprivation of personal liberty so caused was not in accordance with the procedure established by law as there was no law placing restrictions on the citizens of the country to travel abroad, and 4. The unfettered discretion given to the passport authorities to issue or not to issue a passport to a person offended the equality provision of the Constitution.

2.87 Chief Justice Subba Rao delivered the majority judgement on behalf of himself, Shelat and Vaidialingam, JJ and upheld all the above contentions.<sup>^</sup> Chief Justice Subba Rao observed as under: "This decision is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as given to the expression "liberty" by the 5th and 14th Amendments of the U.S. Constitution and the expression "personal liberty in Article 21 only excludes the ingredients of liberty enshrined in the Article 19 of the Constitution. In other words, the expression "personal liberty" in Article 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it in as much as it is specially provided in Article 19." The learned Chief Justice further observed : "As a result of international convention and usage among nations it is not possible for a person residing in India to visit foreign countries, with a few exceptions, without the possession of passport. The Government of India has issued instructions to shipping and airline companies not to take on board passengers leaving India unless they possess valid passport (Passport) is a necessary requisite for leaving India for travelling abroad. The argument that the Act does not impose the taking of a passport as a condition of exit from India, therefore, it does not interfere with the right of a person to leave India.... is a rather hyper technical and ignores the realities of the situation. Apart from the fact that the possession of passport is necessary condition of travel in the international community the prohibition against entry impliedly indirectly prevents the persons from leaving India We have, therefore , no hesitation to hold that an Indian Passport is factually a necessary condition for travel abroad and without it no person residing in India can travel outside India." He, therefore, concluded that a refusal of a passport without the authority of a valid law interfered with the fundamental right of personal liberty to travel abroad. The Chief Justice cited the earlier pronouncements of the Supreme Court in Gopalan's case and Kharak Singh's case.

2.88 Justice Hidayatullah gave the dissenting opinion joined by Justice Bachawat, and he pointed out that passport must be treated as falling within the prerogative domain of foreign affairs and

the authorities which granted or withheld them must possess considerable freedom of action. Before the Government placed in the hands of a person a document which pledged the honour of the country, it had to scrutinize the credentials of such persons. His Lordship, therefore, observed that: " There is thus no absolute right that the State must grant a passport to whomsoever applies for it and subject to a question of arbitrariness or discrimination no one can really be said to possess (81) a right enforceable at law."

2.89 The learned Judge observed that the American analogy could not be used to establish that the Indian Constitution gave the right to travel abroad as a part of the personal liberty of the individual. The Indian position is different in respect of the scope of "personal liberty" from the American position because of the existence of certain specified fundamental rights in Article 19, Since that article expressly conferred the right to move freely throughout the territory of India, it would be strange to argue that the right to travel abroad was included in another article of the Constitution. The only right which Article 21 could include in addition to the one expressly included in Article 19 was the right to leave the country. Further it was doubtful in the opinion of His Lordship whether the Indian Constitution was competent to confer the right of motion and locomotion in a foreign country. According to him : " there is no doubt a fundamental right to equality in the matter of grant of passports but there is no fundamental right to travel abroad or to the grant or refusal of passport.

2.90 It is submitted that the majority Justices nowhere said that there was a fundamental right to the grant of a passport. The majority merely held that since travelling abroad was an attribute of personal liberty it could not be restricted except by procedure established by law. Such a law must be constitutionally valid. A law may impose restrictions on travelling abroad through the power of the executive to grant or refuse a passport, and such law will be valid unless, it is discriminatory. That means in so far as the obtaining of a passport is concerned, there is only a fundamental right to equality and no fundamental right to the grant of a passport. The majority and the minority Justices seem to be in agreement in so far as this point is concerned. However, they differed in their assessment of the actual fact situation. The majority felt that the executive's power to grant or refuse a passport was capable of being exercised discriminately whereas the minority Judge felt that in fact there was no discrimination. The petitioner was alleged to have been indulging in passport frauds and hence the Government had decided to withdraw his passport and his freedom to travel abroad, therefore, had been validly restricted. To meet out the effects of this decision, the Passports (Amendment) Ordinance, 1967 was promulgated which was later replaced by the Passports Act, 1967. (9,-X)

2.91 In Maneka Gandhi's case 'the provisions of Passport Act, 1967 were challenged. The facts of the Maneka Gandhi's case are as under:

2.92 The petitioner, a member of Indira Gandhi family was informed by the Central Government in July, 1977 that her passport was impounded in 'public interest' under section 10(3)(c) of the Passport Act. In response to her inquiry she was told that the Government had decided in public interest not to furnish the reasons for taking such action. Maneka challenged the validity of the order on the ground that section 10(3)(c) violated Articles [k, 19 and 21 and that order issued thereunder without giving any reasons to her was ultra vires section 10(3)(c).

2.93 The grounds for impounding the passport are contained in sub-clause (a) and (h) of section 10, clause (3) of the Act and which is as under: Section 10(3)(c) reads: The passport authority may impound or cause to be impounded or revoke a passport or travel document- (c) if the passport authority deems it necessary so as to do in the interest of the sovereignty and integrity of India, the security of India, friendly relations with any foreign country, or in the interest of the general public

2.94- Section 10(5) requires the authority to furnish on demand the statement of reasons for impounding a passport to the passport holder, unless it was not in the interest of general public. 5  
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2.95 Justice Bhagwati cited with approval^ leading cases on personal iiberty.^'^ He said that in Satwant Singh's case the Court had read the right to passport into personal liberty in Article 21. Therefore to impound the passport of an individual, the executive must act in accordance with the procedure established by law. To emphasize this view he said: "Is the prescriptio n of some sort of procedure enough or must the procedure comply with any particular requirement? Obviously, the procedure cannot be arbitrary , unfair or unreasonable We find tha t even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21."^^^ ^

2.96 Justice Bhagwati examined the Passport Act and found that there is no procedure for impounding the passport and even if some procedure is found in the Act it is unreasonable and arbitrary as it does not provide for giving an opportunity to the holder of the passport to be heard against the order. The Court held that in the absence of any procedure, the principles of natural justice should be followed - audi alteram partem and nemo judex in sua causa. He held that if these requirements are read into Passport Act, the procedure for impounding a passport would be right, just and fair. On the Attorney General's undertaking that the Government would consider the petitioner's representation against the impounding of her passport and give her an opportunity within two weeks after the receipt of her representation the learned Judge held that the challenged order was valid.

2.97 The contribution of Justice Bhagwati in this case can be found out only by seeing how far Article 21 has been freed from the interpretation which was given to personal liberty in Gopalan's case.

2.98 The construction of 'personal liberty ' brings out the substantive rights implicit in it. The construction of the word 'procedure' brings out procedural safeguards fortifying those substantive rights and 'law' identifies the authorities against whom the substantive rights as fortified by those procedural safeguards, are available. This shows that the rights in personal liberty and the procedural safeguards will be available against the legislature and the executive only if law is construed as reasonable law. If law is treated as lex, the rights & safeguards will not be available against the legislature. Therefore to enrich procedure and enlarge personal liberty without treating law as reasonable law will not serve any purpose. In Maneka, it was only Justice Krishna Iyer who treats law as reasonable law. According to Justice Bhagwati Articles 14\* and 19 will take care of draconian laws and strengthen Article 21. But here also he converted the direct and immediate effect into direct and inevitable effect. Inevitable is more exacting than immediate. It is not necessary that all encroachment on personal liberty will have a direct and immediate effect on Articles 14 and 19. In such cases Article 21 will have to stand alone.

2.99 Maneka Gandhi's case rejects the theory that each fundamental right is an island complete unto itself. Justice Bhagwati and Justice Krishna Iyer have highlighted the need to keep in view the synthesis of these rights while interpreting each right. This development will not allow a valid encroachment on one fundamental right to sustain an invalid encroachment on other rights so a valid denial of passport does not validate an invalid infringement of freedom of speech or freedom of occupation.

2.100 If Article 21 leaves legislature free to dispense with "fair play in action" while authorising deprivation of life or liberty it will be a subversion of a fundamental right, if it is held that Article 21 contemplates deprivation of life and liberty through a "a foul play in action." It was only Justice Krishna Iyer who has interpreted procedure as fair play in action and law as reasonable law. Justice Bhagwati's application of the theory that Central Government cannot abuse its powers specially when the Court is alive and active to correct such abuses is not at all correct. What happened at the time of emergency need not be repeated here.

2.101 Justice Krishna Iyer's contribution in this case is noteworthy. Although he has agreed with Justice Bhagwati's observation, he goes much beyond the interpretation given by him on Article 21. In fact Justice Krishna Iyer has used Maneka Gandhi's case to enrich and enlarge Article 21 in post Maneka cases on personal liberty. According to him: "Procedural safeguards are the indispensable essence of liberty. In fact the history of procedural safeguards and the right to a hearing has a human right ring. In India, because of poverty and illiteracy the people are unable

to protect and defend their rights : Observance of fundamental rights is not regarded as good politics and their transgression , , . as bad politics.

2.102 He further held that if Gopalan on Article 21 remained intact, procedural safeguards, as a result of Article 22, would be available only for deprivation of personal liberty through punitive or preventive detention. Deprivation of other rights forming part of personal liberty and the right to life, more fundamental than any other right and paramount to the happiness, dignity and worth of the individual would not be entitled to any procedural safeguards. He agreed with the dissent of Justice Fazal Ali in Gopalan and held that "procedure in Article 21 means fair and not formal procedure and the law is reasonable law and not any enacted piece.

2.103 According to Chief Justice Beg, the opportunity to be heard in defence should 'ordinarily' be given before and not after the impounding of passport. He was therefore inclined to quash the orders of the passport authority impounding the passport. Justice Chandrachud differed from Justice Bhagwati and maintained that the compulsions of due process did not form part of Article 21.

2.104 Justice Kailasam in his dissent denied that any fundamental right could have extra-territorial operation. His main contention was that the State could only restrict or enforce a fundamental right within the territory of India. Therefore, there could be no extra-territorial operation of a funda- (89) mental right. He held that Cooper<sup>^</sup> was not an authority for the proposition that any legislation trenching on Article 21 should also satisfy the requirements of Articles 1<sup>^</sup> and 19. He could have evaluated the Court's opinion (90) (91) (92) in Cooper's case , Saha's case and Sarkar's case but he chose to ignore those cases on the ground that they were not authorities on the relationship between Articles 19 and 21. 2.105 He also held that procedure established by law in Article 21 refers to statute law and as the legislature is competent to change the procedure, the procedure as envisaged in the Criminal Procedure Code cannot be insisted upon as the legislature can modify the procedure.

2.106 Thus from all the above discussion, it can be seen that the Court has laid down a number of propositions seeking to make Article 21 more meaningful than what it was before. The propositions can be summarised 55 as under : (1) The Court reiterated the proposition that Articles 14, 19 and 21 were not mutually exclusive. This means that a law prescribing a procedure for depriving a person of personal liberty has to meet requirements of Article 19. The procedure established by law in Article 21 must answer the requirement of Article 19 as well . (2) The expression personal liberty in Article 21 was given an expansive meaning. The Court emphasized that the expression personal liberty was of wide amplitude covering a variety of rights which go to constitute the personal liberty of man, some of these attributes have been raised to the status of distinct fundamental rights and given additional protection under Article 19. This expression should not be read in a narrow and restricted sense so as to exclude those

attributes of personal liberty, which were specifically dealt with in Article 19. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The right to travel abroad therefore falls under Article 21. Thus no person can be deprived of his right to go abroad except according to procedure established by law. (3) The Court gave new interpretation to the expression "procedure established by law" in Article 21. To deprive a person of personal liberty Article 21 no longer means that law could prescribe some semblance of procedure however, arbitrary or fanciful. It would now mean that procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure cannot be arbitrary, unfair or unreasonable. The concept of reasonableness can be projected in the procedure contemplated by Article 21. The Court now has the power to judge the fairness and justness of procedure established by law to deprive a person of his personal liberty.

2.107 Therefore, it can be said that Maneka's case has brought the fundamental right of personal liberty into prominence. This has been aptly described by an eminent Jurist in his book "The Indian Supreme Court and Politics" in the following words: " It (the Supreme Court) magnified some inherently ordinary cases into great constitutional controversies. If due process had died three early deaths in the Constituent Assembly, in Gopalan and in Shivkant during emergency - it was to be re-born in Maneka. Once reborn, justices decided on a vigorous breast feeding of the new infant: they did not let a single occasion go by in which the due process interpretation of Article 21 could not be nurtured into a giant infant. Article 21 (bashed around quite a bit by the Executive and Courts in 1975-1977) now began to become the soul of the Constitution. "

2.108 From the above para it is clear that Article 21 has acquired an activist magnitude. In a number of post Maneka cases our Supreme Court has given content to the concept of procedural fairness in relation to personal liberty. These cases have been dealt separately in this thesis.

2.109 While this trend is most welcome, it should be mentioned that the Supreme Court should never be instrumental in denying fundamental rights to the individuals which it is enjoined to enforce. But unfortunately this has happened in the landmark Maneka Gandhi case. The Court in this case after elaborately discussing the principles of natural justice and evolving the new concept of personal liberty did not grant her the necessary relief. After having held that the order of impounding the passport was ultra vires the law, the Court should have proceeded further to restore the impounded passport to the petitioner. Instead, the matter was left open knowing full well as to what would be the outcome thereof,

2.110 In yet another recent case of the Union of India v. Charanjit Kaur, passport of respondent Smt. Charanjit Kaur was impounded by the Regional Passport Officer by an order dated August 18, 1981. The reasons for impounding her passport were not furnished to her 'in view of the grave nature of her activities and serious implications in terms of sovereignty and integrity of

India and the security of India' in terms of section 10(5) of the Passport Act. Reported activities detrimental to the security of India, attract the provision of section 10(3)(c) of the Passport Act. No separate show cause notice was issued to the respondent due to seriousness of the case.

2.111 The respondent is the wife of Dr. Jagjit Singh Chauhan, self styled President of so-called National Council of Khalistan Movement who is now resident of U.K. and who was been engaged in sustained anti-India and secessionist activities . 2.112 The order of the Regional Passport Officer was confirmed on appeal by the Chief Passport Officer, but that order was quashed by the Punjab and Haryana High Court on the ground that there was no material before the Passport Officer to impound the passport in public interest. It was also held by the High Court that Bhindranwale factor' was long over as Bhindranwale had died on June 6, 1984 and the order of impounding of passport.

2.113 The High Court gave the opinion that there was no danger from the activities of Smt. Chauhan and just because she happens to be the wife of Jagjit Singh Chauhan, the order was made. The Union of India preferred the appeal by special leave under Article 136 of the Constitution relying on Maneka Gandhi's case where it was observed: "In matters such as grant, suspension, impounding or cancellation of passports, the possible dealing of an individual with nationals and authorities of other States have to be considered. The contemplated or possible activities abroad of the individual may have to be taken into account. There may be questions of national safety and welfare which transcend the importance of the individual's inherent right (95) to go where he or she pleases to go "

2.114 The opinion in this case was delivered by Justice Chinappa Reddy and he has rightly observed that respondent is the wife of leader of Khalistan Movement and this fact can be viewed with other circumstances. Though Bhindranwale had died, the movement initiated had not died. The authorities were justified in suspecting her of being an emissary or a contact person between Dr. Chauhan and the Sikh Militants in India. If the Regional Passport Officer thought that she was likely to indulge in a manner detrimental to the sovereignty and integrity of India and the security of India, it cannot be said that he was acting on no material. The Court made the following observations : " We do not see any justification for treating such a recent event as an incident of the ancient past. We are satisfied that the order of impounding the respondent's passport is based on relevant material and not merely on the sole circumstance that she is the wife of Dr. Jagjit Singh Chauhan. The appeal is allowed, the judgement of the High Court is set aside and the writ petition is dismissed, "

2.115 In the above para the Court has justified the action taken by the Passport Officer on the ground that Smt. Chauhan was the main link between Dr. Chauhan and Sikh Militants in India. Any person who tries to endanger the security of India should be dealt with strictly . The

sovereignty and integrity of India is of utmost importance than the liberty of an individual person.

2.116 Smt. Charanjit Kaur's case speaks of added dimension of liberty under Article 21 of the Constitution. This added dimension is nothing but the concept of relative liberty under the Indian Constitution. It means that concept of liberty is to be analysed by the Court by taking into consideration the facts and circumstances of each and every case. The facts and circumstances of the case will certainly influence the decision of the Court in providing liberty to the people. In this context two situations can be assumed wherein liberty can be dealt with relatively - (1) The ordinary concept of liberty wherein the liberty has been violated in the ordinary circumstances, (2) Liberty has been violated in extra-ordinary circumstances.

2.117 The concept of relativity of liberty has major role to play in extraordinary circumstances. The above mentioned case is the best example of the extra-ordinary circumstances wherein the Court has a major role to determine the relativity of liberty and if as a result of this extraordinary circumstance, liberty of an individual is curtailed to a considerable extent, the Courts would be justified in doing so.

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**Choose the correct option**

1. Which of the following sought to change the character of Indian Government from unitary to federal:
  - A. Government of India Act, 1919
  - B. Government of India Act, 1935
  - C. Indian Council Act, 1909
  - D. Indian Independence Act, 1947.
  
2. The main recommendations of the Cabinet Commission include:
  - A. formation of Federal Union consisting of British Indian provinces and Indian States
  - B. a Constituent Assembly to frame a Constitution for India
  - C. an interim government consisting of representatives of various political parties
  - D. all of the above.
  
3. Which one of the following Acts provided for setting up of a Board of Control in Britain through which the British Government could fully control the British East India Company's civil, military and revenue affairs in India:
  - A. Regulating Act of 1773
  - B. Pitt's India Act, 1784

- C. Charter Act of 1833
- D. Government of India Act, 1858.

4. The plan of Stafford Cripps envisaged that after the Second World War:
- A. India should be granted complete independence
  - B. India should be partitioned into two before granting independence
  - C. India should be made a republic with the condition that she will join the commonwealth
  - D. India should be given dominion status.

5. The Act in which for the first time statutory rules were framed to separate provincial subjects from the central subjects was the:
- A. Government of India Act, 1935
  - B. Government of India Act, 1919
  - C. Indian Council Act, 1909
  - D. Indian Council Act, 1892.